STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
[Neff, P.J., and Wilder and Kelly, JJ.]

FEDERATED INSURANCE COMPANY, a foreign corporation, as Subrogee of Carl M. Schultz, Inc.,
Plaintiff-Appellant,
and

MICHAEL A. COX, Attorney General, *ex rel* MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Intervening Appellant,

v

ROAD COMMISSION FOR OAKLAND COUNTY, a public corporate body,
Defendant-Appellee.

Supreme Court No. 126886

Court of Appeals No 244009

Oakland County Circuit Court No. 00-021170-CE

ATTORNEY GENERAL'S REPLY TO DEFENDANT-APPELLEE'S BRIEF ON APPEAL

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Dated: September 28, 2005

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I. The Attorney General has the statutory and common law authority to intervene in this action and pursue an Application for Leave.

In *Federated Insurance Company v Oakland County Road Commission*,[1] (*Federated*), the Court of Appeals affirmed dismissal of the Plaintiff's cost recovery action under Part 201 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.20101, *et seq*, holding that the statute of limitations had run for the costs incurred by the Plaintiff in addressing environmental contamination at its facility. The Attorney General filed a Notice of Intervention with the Court of Appeals pursuant to MCL 14.28 and 14.101 and then filed a timely Application for Leave to Appeal in this Court. The Application for Leave to Appeal was granted on May 12, 2005.[2]

In its Brief on Appeal, Defendant-Appellee, Road Commission for Oakland County (RCOC) once again asserts that the Attorney General is not a proper party to this action and that it cannot pursue this Appeal. These same arguments were raised in RCOC's Response to the Application for Leave to Appeal dated September 20, 2004. Just as it did in its Response to the Application for Leave to Appeal, RCOC totally ignores MCL 14.101, which authorizes and empowers the Attorney General to intervene in any action at any stage of the proceeding to protect the interests of the State. MCL 14.101 states:

> *The attorney general* of the *state is hereby authorized and empowered to intervene in any action* heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or the people of the state. *Such right of intervention shall exist at any stage of the proceeding*, and the attorney general shall have the same right to prosecute an appeal, or to apply for a re-hearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation. [Emphasis added.]

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[1] *Federated Insurance Company v Oakland County Road Commission*, 263 Mich App 62; 681 NW2d 392 (2004) (*Federated*).

[2] *Federated Insurance Co v Oakland Co Road Comm*, 472 Mich 898; 696 NW2d 708 (2005).

The clear unambiguous language of this statute allows the Attorney General to intervene at any stage of the proceeding, including appeal, whenever such intervention is necessary to protect any right or interest of the State. RCOC simply ignores this statute and asserts that MCL 14.28 requires the Attorney General to file a motion in the Court of Appeals before the Attorney General may intervene in an appeal. MCL 14.101 clearly allows the intervention at this time. Statutes must be applied as written unless the statute is ambiguous or unclear.[3]

The fact that the litigation will be prolonged or that RCOC will be inconvenienced is irrelevant.[4] In fact, a very similar argument was rejected in *Gremore v Peoples Community Hospital Authority*.[5] In that case, the trial court refused to allow the intervention of the Attorney General. The issue presented to the Court of Appeals was the breadth of the Attorney General's discretion to determine that intervention was required by the public interest and the scope of a court's discretion to deny such intervention. The Court of Appeals, in 8 Mich App at 58-59, opined:

> In support of this action by the trial court, plaintiff urges that the inherent power of that court to control the orderly flow of litigation includes the discretion here exercised. The practicality of this position is most appealing, especially to those with trial court experience, but no authority is cited to sustain it, and in the absence of such authority, this Court is bound by the statutory language as heretofore interpreted by the Supreme Court.
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> We read *People v Johnston* (1949), 326 Mich 213, as holding that *the braod discretion granted the attorney general* by CL 1948, 14.28 and 14.101, *supra, is only limited when intervention by the attorney general is clearly inimical to the public interest*. There is no showing on this record that his intervention in this

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[3] *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) and *Metropolitan Council 23 v Oakland County*, 409 Mich 299, 318; 294 NW2d 578 (1980).

[4] Any inconvenience on RCOC's part is the fault of RCOC. It advocated an interpretation of the statute of limitations that is not supported by the plain language of Part 201 or its statutory scheme. The interpretation advanced by RCOC affects the State's ability to recover costs it has incurred at numerous sites of environmental contamination.

[5] *Gremore v Peoples Community Hospital Authority,* 8 Mich App 56, 153 NW2d 377 (1967).

> case is clearly inimical to such interest, and his statutory right of intervention requires reversal. [Emphasis added; footnotes omitted.]

RCOC also asserts that the Attorney General has no standing and merely raises a hypothetical issue. Again, MCL 14.101 clearly gives the Attorney General standing and the right to intervene in this action. Numerous decisions have recognized that the Attorney General has the authority and right to intervene in an action. The courts have consistently held that the Attorney General should be allowed to intervene or bring an action unless to do so "is clearly inimical to the public interest."[6] As noted in *In re Certified Question (Wayne County v Philip Morris)*,[7] the Legislature specifically "authorized the Attorney General to intervene at any stage of a proceeding and grant [the Attorney General] the same rights possessed by other parties to the suit." Protecting the State's ability to recover multiple millions of dollars from those who caused environmental contamination is not inimical to the public interest nor is seeking review of a decision that wrongly interprets a statute enforced by the Attorney General inimical to the public interest.

Furthermore, "the attorney general has a wide range of powers at common law."[8] Thus, the Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed."[9] The Attorney General has broad discretion "in determining what matters may, or may not, be of interest to the people generally."[10]

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[6] *Associated Builders and Contractors, Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (6th Cir 1997) (citing *In re Intervention of Attorney General*, 326 Mich 213; 40 NW2d 124, 126 (1949)).
[7] *In re Certified Question (Wayne County v Philip Morris)*, 465 Mich 537, 544; 638 NW2d 409 (2002).
[8] *Mundy v McDonald*, 216 Mich 444, 450; 185 NW 877 (1921).
[9] *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789; 262 NW2d 676, 677 (1977).
[10] *Mundy*, 216 Mich at 450.

The State's interest in this case is not hypothetical. On the contrary, the State's interest in this matter is concrete and substantial. The Court of Appeals decision is a published opinion that is binding under MCR 7.215(C)(2). It misconstrues a statute, Part 201 of the NREPA,[11] that is frequently relied upon by the Attorney General and the Michigan Department of Environmental Quality (MDEQ) to recover costs incurred at sites of environmental contamination. Rather than have this Court definitively and correctly interpret the statute, RCOC asserts that the Attorney General should just wait until other courts apply the binding precedent to other cases that the Attorney General is an original party to. RCOC is suggesting that it is more appropriate to tie up numerous other cases in the circuit courts and the Court of Appeals and pursue resolution of this issue later. While this may be more convenient to RCOC, it puts numerous State cases and millions of dollars in State cost recovery at risk. The Court of Appeals, in a published opinion, misconstrued a statute in such away that it will affect the State's ability to recover multiple millions of dollars from polluters. This is not a hypothetical situation, but a real controversy regarding the interpretation of the statute of limitations under Part 201.

RCOC also asserts that the Attorney General was not a party in the Court of Appeals thus it cannot pursue this Appeal. It appears to be RCOC's position that the Attorney General must have filed something in the Court of Appeals within twenty-one days after the Court of Appeals rendered its decision, or within the time frame for the filing a Motion for Rehearing, in order to be considered a party to the action.[12] RCOC ignores the fact that an Application for Leave to Appeal under MCR 7.302(C)(2) is not due until 42 days after the Court of Appeal renders its decision. The case is not "over" twenty-one days after a decision is rendered. The judgment or

[11] MCL 324.20101 *et seq.*
[12] See MCR 7.215(I).

decision is not enforceable until 42 days after the decision is rendered.[13] A case is pending until the time for filing an Application for Leave has expired. The Attorney General intervened in the Court of Appeals while the case was pending. The Attorney General is a party with standing and is entitled to seek review in this Court.

II. The Court of Appeals interpretation of the statute of limitations under Part 201 is contrary to the plain language of Part 201 and its statutory scheme.

Section 20140(1)(a) of NREPA[14] states:

> Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:
> (a) For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c), *within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility*, except as provided in subdivision(b). [Emphasis added.]

As set forth in the Plaintiff-Appellant's Brief on Appeal, the initiation of on-site construction activities must be for a "remedial action" and the remedial action must be selected or approved by the MDEQ. RCOC continues to maintain that the meaning of "remedial action" can be ascertained from the definition of that term alone, without any reference to the related definitions and the entire statutory scheme of Part 201. As set forth in the Plaintiff-Appellant's Brief on Appeal, RCOC's position and the Court of Appeals decision are contrary to the language of the statute and applicable principles of statutory construction. The activities undertaken in 1991 were not, and still are not, part of an approved remedial action.[15]

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[13] See MCR 7.215(E) and 7.302(C)(2).
[14] MCL 324.20140(1).
[15] RCOC asserts that this argument was not raised below and therefore it has not been preserved for appeal. See RCOC's Brief on Appeal at pp 20 and 23. The argument was considered by the Court of Appeals and is preserved for appeal. See *Federated*, 263 Mich App at 68.

In its Brief on Appeal, RCOC asserts that the January 22, 1993 letter[16] is evidence that the MDEQ approved a "remedial action" for the release of hazardous substance on the Schultz property. RCOC does not point to any other evidence that MDEQ approved any other response activities or remedial actions for either the Schultz facility or for the RCOC facility.

Section 20118 of Part 201 states that a remedial action must meet certain criteria or "accomplish" specific goals including obtaining a degree of cleanup that complies with all applicable or relevant and appropriate requirements of state and federal law. MCL 324.20118(2) states:

> Remedial action undertaken under subsection (1) at a minimum shall accomplish all of the following:
> (a) Assure the protection of the public health, safety, and welfare, and the environment.
> (b) Except as otherwise provided in subsections (5) and (6), attain a degree of cleanup and control of hazardous substances that complies with all applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards of state and federal environmental law.
> (c) Except as otherwise provided in subsections (5) and (6), be consistent with any cleanup criteria incorporated in rules promulgated under this part.

RCOC asserts that the MDEQ has not established that the interim response activity approved by the MDEQ will not meet the criteria of subsection 20118(2). The January 22, 1993 letter that RCOC relies on establishes, on its face, that it is not an approval of a remedial action that meets the requirements of subsection 20118(2). The January 22, 1993 letter required Schultz to undertake additional investigations to define the vertical and horizontal extent of the contamination.[17] If the extent of the contamination is not known it is impossible to approve a remedial action that meets all relevant requirements. The relevant requirements will not be known until the extent of the contamination is known. MDEQ did not and could not have

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[16] Appendix 15a-17a.
[17] Appendix 15a-16a.

approved a remedial action that meets the requirements of subsection 20118(2) because further investigations were necessary. The letter expressly states that more response activities may be necessary: "This should not be construed as a sign off on all investigations or corrective actions that may be required by the state."[18] The January 22, 1993 letter was not approval of a plan that complied with all applicable or relevant and appropriate standards of state and federal environmental laws, and therefore it was not an approval of a remedial action.

Moreover, there is nothing in the record to suggest that MDEQ approved a remedial action for the *RCOC facility*. RCOC asserts that an interim response activity that is approved for one facility that inadvertently addresses contamination from another facility triggers that statute of limitations for cost recovery associated with the other facility even though no response activities for that facility have been reviewed or approved by MDEQ. Section 20140(1) of Part 201 states that there must be: (1) initiation of on-site construction; (2) for a remedial action; (3) selected or approved by the MDEQ; (4) for a facility.[19] No remedial action or response activities were approved for the RCOC facility, thus the statute of limitations for costs incurred for the RCOC facility has not been triggered.

The Court of Appeals decision results in the statue of limitations beginning to run before a remedial action has been selected or approved by the MDEQ. The Court of Appeals found that MDEQ approved a work plan on January 22, 1993.[20] However, the Court of Appeals held that the statute of limitations began to run in 1991, *two years prior* to the alleged MDEQ approval.[21] It is clear under Sub-section 20140(1)(a) there must be both a "remedial action" and "approval"

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[18] Appendix 17a.
[19] MCL 324.20140(1).
[20] *Federated*, 263 Mich App at 64.
[21] *Federated*, 263 Mich App at 68.

by the MDEQ before the statute of limitations begins to run. The Court of Appeals decision is contrary to the clear language of the statute.

RCOC continues to claim that only on-site construction is needed to trigger the statute of limitations, MDEQ approval can occur at any time, and the approval does not affect when the statute of limitations begins. This is clearly contrary to the express language of Section 20140. Under RCOC's theory one could initiate on-site construction of any activity and not obtain approval from the MDEQ for over 6 years; this would result in the statute of limitations running before MDEQ even knows there is a problem and before costs are incurred. Under MCL 324.20140(1) it is clear that there must be initiation of on-site construction of a remedial action that has been approved or selected by the MDEQ. Both on-site construction and approval by MDEQ of a remedial action are necessary before the statute of limitations is triggered. This issue alone requires correction and clarification from this Court.

RCOC concedes that a claim for cost recovery cannot accrue until costs are incurred.[22] This is not at all clear from the Court of Appeals opinion. The only requirement the Court of Appeals found for triggering the statute of limitations was that someone initiate on-site construction of a response activity. The Court of Appeals recognized that MDEQ approval was also necessary but it did not affect when the statute of limitations was triggered. The result of the Court of Appeals' published opinion is that the statute of limitations can run before costs are incurred by the State or another party. Again, this issue needs correction and clarification from this Court. A party must incur costs before the statute of limitations is triggered.

[22] RCOC's Brief on Appeal at p 28.

Conclusion and Relief Requested

The Court of Appeals decision is contrary to the plain language of Part 201 and its statutory scheme. Intervening Appellant respectfully requests that this Court reverse the Court of Appeals and issue an opinion interpreting the statute of limitations in Part 201 that is both consistent with the plain language and statutory scheme of Part 201.

Respectfully submitted,

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Dated: September 28, 2005

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